In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1466

STEPHEN HARVEY MILLANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of having wilfully refused to obey the order of his local Selective Service board to submit to induction, in violation of 50 U.S.C. App. 462. He was sentenced to three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A), relying on its recent *en banc* decision in *Ehlert* v. *United States*, No. 1383, this Term, certiorari granted, May 4, 1970 (see Pet. App. B.).

The evidence in petitioner's Selective Service file showed that, from the time he first registered with his local board (in 1965) until shortly after a notice to report for induction on July 25, 1967, was mailed to him on July 10, 1967, petitioner was classified I-A and made no request for conscientious objector status. On July 13 and 18, 1967, letters were received from petitioner requesting the special form for conscientious objectors. This form was mailed to him and was returned, completed, on July 20, 1967. In that form petitioner claimed to be conscientiously opposed to participation in war in any form, but did not indicate when his alleged religious beliefs had been formed (SSF 32-35).[1] On July 21, 1967, petitioner was informed by letter that the board had "considered" the information contained in his C.O. form but had concluded "that the facts presented [did] not warrant * * * reopening or reclassification" (SSF 39). Petitioner was directed to report as ordered, but he failed to do so. Instead, on the date fixed for his induction (July 25), he had a friend deliver a letter to the local board in which he reiterated his view that he was entitled to C.O. status and stated (SSF 40):

> While my request for reclassification may have been made at a later date than usual, it was

[1] Petitioner indicated in the form that he believed in one God and that the duties owed to the Supreme Being were superior to any others. He averred that the source of his beliefs was his own conscience and that he relied on no one for religious guidance. He described his trade as that of a musician and stated that he did not use animal life or the products thereof for food or any other purposes.

> still made as soon as, in the course of my growth and experience, my thoughts on the subject of war and its relationship to my life and rights and my duty to the Supreme Being became sufficiently crystallized that I understood myself and these issues well enough to know the stand that I must take. My conscience demands that I take this stand, and I cannot do otherwise.

Petitioner was not prosecuted for his failure to report on July 25. Thereafter, on August 4, 1967, the local board received sixteen letters supporting petitioner's request for reclassification as a conscientious objector. On August 8, 1967, the board notified petitioner by letter that it had again reviewed his file, including the letters submitted, and determined that the facts presented did not warrant a reopening or the reclassification requested (SSF 65). Petitioner was ordered to submit to induction on August 15, 1967. On that date, petitioner reported to the induction station but refused to be inducted. His indictment and conviction followed.

In the petition (the argument portion of which is identical to that in *Wenzel* v. *United States*, pending on petition for a writ of certiorari, No. 1455, this Term), petitioner contends that the pertinent regulation (32 C.F.R. 1625.2), providing that a local board may not reopen a classification after the notice of induction has been mailed unless it first finds that there has been a change in the registrant's status resulting from circumstances over which he has no control, is invalid if interpreted as the Ninth Circuit did in *Ehlert* v. *United States*, *supra*, as not permitting a claim of conscientious objection to be consid-

ered since the "circumstance" was within the registrant's control. Petitioner correctly points out that the courts of appeals are and have been for some time divided on this question as to the meaning of 32 C.F.R. 1625.2, with the majority of circuits adopting the position taken by the Ninth Circuit in *Ehlert*.

We have previously indicated that we think this issue should be resolved by this Court in an appropriate case. On May 4, 1970, this Court granted certiorari in *Ehlert* (No. 1383, this Term). Since the court below expressly relied on *Ehlert* in deciding the instant case, and since the issue common to the two cases will apparently be resolved in that case, it would therefore seem appropriate to defer action on the instant petition until after *Ehlert* is decided.[2]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1970.

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[2] In other pending cases seeking to present the identical issue, we have urged that the petitions should be denied since the facts in those cases failed to demonstrate that the petitioners' alleged conscientious objector beliefs first crystallized *after* the notice of induction was mailed. See *Eason* v. *United States*, No. 1944 Misc., this Term. In *United States* v. *Holmes*, No. 1311, this Term, the government has filed a petition for certiorari from the ruling of the Second Circuit allowing a registrant to raise, orally and for the first time at the induction station, a claim of conscientious objection. That case raises an issue similar to that in *Ehlert*, but additional questions as well.

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